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No. 97-1121

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

City of Chicago,

Petitioner,

v.

Jesus Morales, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court of Illinois

BRIEF *AMICUS CURIAE* OF OHIO, CALIFORNIA, ILLINOIS, KANSAS, LOUISIANA, MICHIGAN, MISSISSIPPI, NEBRASKA, NEVADA, SOUTH CAROLINA, SOUTH DAKOTA AND THE COMMONWEALTHS OF PENNSYLVANIA AND VIRGINIA IN SUPPORT OF THE PETITION

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STATEMENT OF *AMICI* INTEREST

The State of Ohio, together with twelve other *amici* States, join the City of Chicago in urging the Court to review the decision of the Supreme Court of Illinois. Because the *amici* States share the City's concerns about the urban crime, violence and disruption of community life that criminal gangs continue to spawn throughout the country and because they share with their political subdivisions the essential lawmaking responsibility for rooting out these problems, they agree that the Court should clarify the permissible scope of police power that the Constitution tolerates in this important area.

The problems that youth gangs have brought to local communities are new in kind, and indeed would have surprised most prior generations of American adults. A 1995 survey of over 4000 local law enforcement agencies confirms the pervasive scope of youth gang influence in modern America: It shows the existence of gang activity in all fifty states; it demonstrates a gang presence in rural as well as urban counties; and it shows a total of 23,388 youth gangs and a total of 664,906 gang members. *See* 1995 National Youth Gang Survey, published by the Office of Juvenile Justice and Delinquency Prevention of the U.S. Department of Justice, p. xi. The overwhelming majority of law enforcement agencies report that gang problems in recent years either have stayed the same or are getting worse, with almost half reporting worse. *Id.* The National Institute of Justice reports similar statistics. In 1993, when there were 16,643 gangs with 555,181 members, the Institute projected 580,331 gang crime incidents nationwide. D. Curry et al., *Estimating the National Scope of Gang Crime from Law Enforcement Data* (Nat'l Institute of Justice, Aug. 1996), at 3-4. The volume of such crimes, the Institute estimated, grew from eight to 11 times the number that existed in 1991. *Id.*

To their credit, State and local governments have attempted to respond to these disturbing developments through a number of different strategies. At the State level, for example,

Ohio has proposed legislation that makes it a second degree felony to "actively participate" in a criminal gang and to promote or assist in the commission of specified crimes. The pending legislation in Ohio follows the lead of California's "STEP" legislation ("street terrorism enforcement and prevention"), first enacted in 1988 and amended several times since then. Cal. Penal Code §§186.20, 186.21 (legislative findings), 186.22(a) (prohibiting active participation plus promoting or assisting with predicate offenses), 186.22(c), (f) (definitions), 186.26 (offense of coercing a minor to participate in a gang), 186.28 (offense of supplying firearms to gang) (West Supp. 1998).

In like manner, several other States either criminalize gang participation or enhance penalities based on the gang-related nature of a criminal act. *See, e.g.*, Ariz. Rev. Stat. Ann. §§ 13-105 (definitions), 13-2308(G) (class 2 felony offense of criminal gang participation) (West Supp. 1997); Ark. Code Ann. §§ 5-74-102 (legislative findings), 5-74-103 (definitions), 5-74-104 (defining first and second degree gang participation offenses), 5-74-203 (gang recruitment offenses), 5-74-105 (offense of using another's property for gang activity), 5-74-107 (unlawful discharging of firearms from vehicle) 5-74-108 (enhancement of penalties acting in concert), 5-74-201 (findings), 5-74-202 (definitions), 5-74-203 (offense of soliciting gang membership) (Michie 1997); Fla. Stat. ch. 874.02 (legislative findings), 874.03 (definitions), 874.04 (enhancement of felonies committed as part of pattern of gang activity) (1993); Ga. Code Ann. §§ 16-15-2 (legislative findings), 16-15-3 (definitions), 16-15-4 (enhancement of gang-related misconduct) (Michie 1996); Ind. Code §§ 35-45-9-1, 2 (definitions), 35-45-9-3 (gang participation offense), 35-45-9-4 (compelling membership in gang) (1993); 720 Ill. Comp. Stat. Ann. 570/405.2 (offense of street criminal drug conspiracy) (West Supp. 1997); Iowa Code Ann. §§ 723A.1 (definitions), 723A.2 (gang participation offense) (West 1993 & Supp. 1997);

Kan. Stat. Ann. § 21-4704(k) (sentencing guidelines presume imprisonment for gang offense) (Supp. 1996); La. Rev. Stat. Ann. §§ 15:1402 (legislative findings), 15:1403 (gang participation offense), 15:1404 (definitions) (West 1992 & Supp. 1998); Mass. Gen. Laws Ann. ch. 265, § 44 (offense of coercing minor to join gang) (West Supp. 1997); Minn. Stat. § 609.229 subd. (1) (definitions), subd. (2) (participation offense) (1992 & Supp. 1993); Mo. Ann. Stat. §§ 578.421 (definitions), 578.423 (participation offense), 578.425 (enhancements), 578.435 (offense of possessing weapons for gang crime) (West 1995); Mont. Code Ann. §§ 45-8-402, 405 (definitions), 45-8-403 (offense of coercing membership), 45-8-404 (enhancement of sentence for gang-related felony), 45-8-406 (offense of supplying firearms to gang) (1997); Nev. Rev. Stat. § 193.168 (doubling prison term for gang-related crime) (1997); Okla. Stat. Ann. §§ 21-856 (offense of willfully recruiting minor into gang) (West Supp. 1998); S.D. Codified Laws §§ 22-10-14 (definitions), 22-10-15 (enhancements) (Michie Supp. 1997); Tex. Penal Code Ann. §§71-01(d) (definition), 71-02 (participation offense) (West Supp. 1998). Alaska also uses gang-participation as an element in some crimes. Second degree murder, for instance, occurs when the individual causes the death of a non-participant while committing or attempting to commit a felony. *See* Alaska Stat. §11.41.110(4) (Michie 1996). The State also makes gang participation an aggravating factor in sentencing, §12.55.155(28), and outlaws gang recruitment, §11.61.160, 165 (Michie 1996).

The Chicago ordinance follows a similar path in trying to inhibit gang violence and maintain public order. Based on extensive testimony before the City Council, the ordinance tries carefully to strike at the following evils: the intimidation of law-abiding residents by gang loitering; and the creation of a context and cover for gang criminal activities as well as a method of recruitment. The Illinois Supreme Court did not appear to doubt any of this. Yet under its holding society's power to

defend itself against these acknowledged evils was sharply curtailed. It would seem to be an essential function of State and local government to determine the proper balance between rights and regulations concerning access to and enjoyment of a community's streets, above all to ensure equal access to this basic component of urban life. Because the *amici* States need the legislative tools to engage in criminal gang control and community policing, they respectfully submit that the Court should grant review of the decision of the Illinois Supreme Court to clarify this essential area of the law.

REASONS FOR GRANTING THE WRIT

At the same time the Illinois Supreme Court recognized that "[c]riminal street gangs are an expanding cancer in our society and their illegal activities endanger the safety of many law-abiding citizens," Pet. App. 17a, the court struck a debilitating blow to the reasonable efforts of State and local governments to abate youth gang crime. The problem with the decision is not that it contradicts *dicta* in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). It is precisely that broad *dicta* in *Papachristou* would seem to sanction not just the lower-court decision but virtually any other decision that invalidates sensible lawmaking efforts like these. *See* Pet. App. 9a (citing Papachristou for the proposition that a law is infirm if it "makes criminal" activities which "by modern standards are normally innocent"); *id.* 17a ("The Court observed [in *Papachristou*] that such activities [loafing, loitering and nightwalking] are amenities of American life").

The breadth of the *Papachristou dicta* not only overprotects criminal gangs but also underprotects other members of urban communities. If walking the streets or even sauntering about them are constitutional "amenities of American life," for example, *Papachristou*, 405 U.S. at 164, then surely they are amenities to be enjoyed by all American citizens.

When a city like Chicago thus determines that brazen, intimidating, even coercive, members of its community are infringing the enjoyment of these amenities by all citizens, it ought to have the police power to ensure that the allocation of these amenities is fairly distributed. Current law, however, makes that very difficult.

A. The Deliberate Nature Of Chicago's Efforts To Regulate Criminal Gang Loitering Contrasts Markedly With The Anachronistic Jacksonville Ordinance Invalidated In *Papachristou*.

As an initial matter, it is important to emphasize the differences between the Chicago ordinance and the Jacksonville (and State-law) provisions invalidated by *Papachristou* 26 years ago. The *Papachristou* ordinances addressed a problem whose time had come and gone. As a brief review of the provisions confirms, *see Papachristou*, 405 U.S. at 158, "Jacksonville's ordinance and Florida's statute were derived from early English law, and employ[ed] archaic language in their definitions of vagrants," *id.* at 161 (quotation omitted). Even though "the theory of the Elizabethan poor laws" that perpetuated and harshened these laws "no longer fits the facts," and even though the "conditions which spawned these laws may be gone," the "archaic classifications remain[ed]" in Florida in the early 1970's. *Id.* at 161-62 (quotations omitted).

In conspicuous contrast to the *Papachristou* laws, which after years of innocuous desuetude were suddenly enforced in Florida, the Chicago ordinance takes aim at a distinctly modern problem with a fresh set of legislative facts to support it. As the Illinois Supreme Court recognized, the ordinance represents the culmination of significant study and consideration. It starts out (Pet. 60a) by identifying the policy judgments that prompted the law -- an increasing murder rate as well as an increase in violent

and drug-related crimes, an assessment that criminal street gang activity bears a substantial responsibility for the problem, and the use of loitering by criminal gangs to maintain control over identifiable areas and to intimidate others from using those areas. The ordinance then proceeds to define "criminal street gang" as

> any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more . . . enumerated [criminal acts], and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

Pet. 61a- 62a. A "pattern of criminal gang activity" in turn means "two or more acts of criminal gang activity of which at least two such acts were committed within five years of each other." *Id.* at 63a.

Unlike the *Papachristou* ordinances, the Chicago law regulates a current and serious problem, and does so on the basis of up-to-date legislative findings. The provision also uses familiar definitions of crime. The definition of a "pattern of criminal gang activity," for instance, parallels the familiar concepts of "enterprise" and "pattern of racketeering activity" found in federal and state RICO legislation. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *United States v. Turkette*, 452 U.S. 576, 578-79 (1980). This of course helps to distinguish the law from other cases as well. *See Lanzetta v. New Jersey*, 306 U.S. 451, 453-54 (1939) (finding law vague because it defined "gang" to mean simply "two or more persons" without also defining impermissible gang conduct).

In further contrast to the *Papachristou* laws, Chicago's delegation of authority to disperse loiterers based on an officer's objective determination that one of them is likely to be a criminal gang member represents an innovation in community policing. It is typical of other urban inititiatives designed to abate youth gang street crime by moving away from a crime-solving model of law enforcement to a preventive, community-policing model. The new approach rests upon the insight that by declining to tolerate mild levels of public disorder, cities can avoid the all-too-familiar spiral into more severe disorder, crime and community dysfunction. *See* D. Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L.Rev. 551, 581-82 (1997) (citing empirical research supporting the "broken windows" thesis -- that unremediated disorder leads to greater disorder). While this model plainly offers a fresh approach to urban crime, it also coincides with the concern of residents in many urban communities that "passivity in the face of outrageous street behavior" constitutes a critical law-enforcement shortcoming. G. Kelling & C. Coles, *Disorder and the Court*, 116 Pub. Interest 57, 70 (1994).

Nor is the new Chicago ordinance the first one to fall victim to the broad *dicta* in *Papachristou*. In 1989, the District of Columbia passed an "illegal drug zone" ordinance, 36 D.C. Reg. 2835, authorizing the Chief of Police to disperse persons who congregate within the specially-designated zones for up to five days. The D.C. Superior Court invalidated the law on vagueness and overbreadth grounds. *See United States v. Kennedy*, 118 Daily Wash. L. Rep. 873 (Jan. 12, 1990). Unlike the present law, the D.C. ordinance potentially subjected any assemblage to dispersal within the zone (even a First Amendment activity), and failed to give the police any express standard as to which congregations of people should be dispersed and which should not be. Like the lower court here, however, the D.C. court invoked broad language from

Papachristou, stating that "the freedom to be with intimate relations and close friends in public places would seem as fundamental as the liberty of the individual simply to walk or loiter in those places, which the Supreme Court in *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163-65 (1972) found protected by substantive due process." 118 Daily Wash. L. Rep. at 877.

B. The Chicago Ordinance Is Not Unconstitutionally Vague.

The Chicago ordinance does not violate the Constitution's prohibition against vague criminal laws. In particular, it steers clear of the two flaws that characterize such laws: They fail either to "provid[e] fair warning" of what is prohibited or to "provide explicit standards" to limit the discretion of those who enforce the law. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

Neither defect applies here. In plain terms, the ordinance (1) authorizes the police to issue a dispersal order when they reasonably believe that one or more loiterers is a criminal gang member; (2) gives additional notice to all persons covered by the law when they are told to disperse; and (3) sanctions only those who disobey the police orders.

Chicago, then, chose not to regulate loitering in and of itself, but only to regulate it when combined with criminal gang activity and when police orders to disperse are ignored. These features of the law bring it well within the parameter of other laws the Court has upheld. *See, e.g., Grayned*, 408 U.S. at 113 (1972) (upholding conviction for creating noise near school where police discretion was cabined by required showing of interference with school activities); *Colten v. Kentucky*, 407 U.S. 104, 108-09 (1972) (upholding conviction under disorderly conduct statute that required compliance with dispersal order

and that required intent to cause public inconvenience). *Cf. Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965) (upholding disobedience-to-police-order law when coupled with element of sidewalk blockage).

Instead of stopping here and relying on this authority, however, the lower court proceeded. It took the view that these features of the law did not suffice to save it, even when combined with an order of dispersal and a careful definition of criminal gang activity, because the individual "has no way of knowing whether an approaching police officer has a reasonable belief that the group contains a member of a criminal gang." Pet. 11a-12a. In the lower court's view, in other words, the validity of requiring compliance with police orders turns on whether the individuals subject to the order themselves perceive an objective basis for the order, not whether the officers have an objectively reasonable basis for issuing the order. No doubt other courts have voiced similar sentiments. *See, e.g., City of Akron v. Rowland*, 618 N.E. 2d 138, 145 (Ohio 1993) (drug loitering ordinance held invalid where, "without being able to read the officers' minds," a suspect could not ascertain the reasonableness of police suspicion). But these views cannot be squared with traditional methods for balancing a community's collective interests in security against the individual's interest in liberty.

Left unreviewed, this position also threatens to upset time-honored understandings of the legitimate authority of the police to investigate, ferret out and stop crime. The Fourth Amendment has long used "reasonable suspicion" and "probable cause" as objective touchstones for determining when government may interfere with individual liberty. *See Terry v. Ohio*, 392 U.S. 1, 20-22 (1968) (discussing probable cause and reasonable suspicion standards as the basis for "assur[ing] that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of

a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances"). Indeed, the Fourth Amendment itself refers just to "unreasonable searches and seizures," and has never assessed compliance with the standard from the perspective of the *individual's*, as opposed to the officer's, objective determination of whether cause exists to request an accounting of the individual's conduct.

Case law proves the point. The Court has frequently examined the objective reasonableness of law-enforcement action from the standpoint of the officer involved, not the individual suspected of crime. *See Ornelas v. United States*, 116 S.Ct. 1657, 1661-62 (1996) ("components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether those historical facts, *viewed from the standpoint of an objectively reasonable police officer*, amount to reasonable suspicion or to probable cause"); *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968) (standard for reviewing Fourth Amendment reasonableness is "would the *facts available to the officer* at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate") (internal quotation omitted). Under the *Terry*-stop rule, as a result, police may briefly detain an individual on "reasonable suspicion" that crime is afoot even though probable cause does not yet exist. In the words of Justice Brennan: "The *Terry* doctrine permits police officers . . . [i]f *they have the requisite reasonable suspicion* . . . [to] use a number of devices with substantial coercive impact on the person to whom they direct their attention, including an official 'show of authority,' the use of physical force to restrain him, and a search of the person for weapons." *Kolender v. Lawson*, 461 U.S. 352, 364 (1983) (Brennan, J., concurring). As these cases illustrate, the

authority of law enforcement to intrude upon an individual's liberty simply does not turn on the suspect's insight into the reasonableness of the officer's action.

In addition generally to looking at these requirements from the perspective of the law-enforcement officer, the Court's search-and-seizure decisions also have applied these reasonableness principles specifically to similar types of law-enforcement action. Just as Chicago authorizes an officer to stop "a person whom he reasonably believes to be a criminal street gang member," 8-4-015(a), so too federal drug enforcement agents frequently stop travelers in an airport who fit the profile of a drug courier. In the drug interdiction context, the Court has frequently permitted such detentions (which, it is worth adding, pose far more risk of arrest and loss of liberty than an order to disperse). *See United States v. Sokolow*, 490 U.S. [illegible] (1989); *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985). Roadside stops also may be justified by particularized, articulable suspicion of drug trafficking. *See, e.g., United States v. Sharpe*, 470 U.S. 675 (1985). Even without reasonable suspicion, the Court has permitted random drug testing and random roadside stops to end drunk driving. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Michigan Dept. Of State Police v. Sitz*, 496 U.S. 444 (1989).

Surely, in the light of these precedents, Chicago does not offend the Constitution when it authorizes officers to impose a *de minimis* restriction on individual liberty with a far greater explanation for doing so than these Fourth Amendment decisions require. Here, officers observed a group of persons loitering in a public place. They formed a "reasonable belief" that the individuals belonged to a criminal gang. They asked them to disperse. Then and only then did the officers arrest anybody, and even then only for failing to do what all citizens in a civil society customarily have been expected to do -- obey the

police. *See Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) ("[c]ivil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses"); *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) (maintaining public order protects liberty itself from being "lost in the excesses of anarchy").

As in the Court's drug-profile cases, moreover, the general police order implementing the Chicago ordinance illustrates a city policy ensuring that trained officers will perform this function, Pet. App. 65a, and sets forth identifiably objective criteria for determining gang membership, Pet. App. 67a-68a. *See also Sokolow*, 490 U.S. at 10. In the end, it would seem anomalous if the vagueness limitation of the due process clause of the Fourteenth Amendment prohibited what the search-and-seizure requirement of the same clause positively permits.

No such anomaly, however, exists. Contrary to the lower-court's decision, similar rules have governed vagueness and overbreadth challenges. *See Boos v. Barry*, 485 U.S. 312, 331-32 (1988) (rejecting vagueness challenge to ordinance limiting demonstrations at embassies because it was interpreted to permit dispersal "only when the *police reasonably believe* that a threat to the security or peace of the embassy is present"); *Grayned*, 408 U.S. at 114 (acknowledging that enforcing ordinance prohibiting noisy interference with school activity "requires the exercise of some degree of *police judgment*, but, as confined, that degree of judgment here is permissible"); *Colten*, 407 U.S. at 109 (upholding conviction for disorderly refusal to obey dispersal order where "police had cause for apprehension . . . [of] the risk of accident").

All things considered, the Chicago ordinance advances the group goals of security without infringing on individual constitutional rights. In many respects, the legality of this

ordinance poses a far less severe risk to liberty than the customary right of officers to detain individuals reasonably suspected of crime. Notably, Chicago does not authorize a detention based upon loitering with a gang member, but only upon refusal to obey the dispersal order. Far from requiring detention, the police officer's order assumes detention will be avoided when the individual complies with the order. Accordingly, while the Chicago ordinance contemplates that the individual will exercise his or her freedom to walk away, a Fourth Amendment seizure contemplates that the police will "restrain[] his freedom to walk away," *Terry*, 392 U.S. at 16. At most, in other words, the dispersal order intrudes upon a generalized privilege of casual association in public places -- a privilege that receives no special constitutional protection under *City of Dallas v. Stanglin*, 490 U.S. 19 (1989). The lower-court's contrary position should be reviewed and reversed.

C. The Chicago Ordinance Does Not Violate Substantive Due Process.

In addition to misjudging vagueness law, the lower court erred in striking the law in all of its applications (*i.e.*, facially) on substantive due process grounds. While the court properly recognized that the law was subject to rational-basis review and could be invalidated only if it "intrude[s] upon personal liberties arbitrarily or in an utterly unreasonable manner," Pet. 18a, it nonetheless found the law unconstitutional. This, too, was error, and ought to be reviewed.

It is difficult to see how the Chicago ordinance falls short of meeting the modest requirement of rational lawmaking. While the laws at issue in *Papachristou* may not have contained a rational means-end fit, Pet. 18a-19a, this law certainly does. It takes on the acute problems of youth gang crime by carefully regulating criminal gang loitering in the urban setting. Three specific harms form the basis for the law:

- **Intimidation.** By occupying a specific street corner or some other public place, criminal gang members chill ordinary, legitimate passage by law-abiding citizens, thereby securing an area from which to conduct criminal activity -- most prominently and most usually, drug-dealing.

- **Facilitation.** The presence of loitering criminal gang members provides a context in which crime flourishes. A drug transaction in a loitering crowd, for example, provides cover, allows perpetrators to evade being caught, and creates a group dynamic of lawlessness that is larger than the sum of its individual parts. The conspicuous public presence of the gang also makes it difficult for innocent youths to resist the temptation (or outright pressure) to join one or another criminal gang.

- **Victimization.** A particularly cruel feature of criminal gang activity is the loss of young lives through gang shootings, be they the lives of fellow gang members or those of unfortunate bystanders. Loitering by persons with identifiable gang membership, the Chicago experience has shown, creates a frequent target for rival gangs.

Plainly, these reasons together with those identified in the extensive hearings before the Chicago City Council, suffice to establish a rational basis for enacting this law.

But even if these rational bases did not support the legislation in some circumstances, they most assuredly supply sufficient grounds to prevent the Illinois Supreme Court from striking the law facially, which is to say in all of its applications. A facial challenge is the most difficult to sustain. Because courts have a duty to save, not destroy, legislation, *see Adams*

Fruit Co. v. Barrett, 494 U.S. 638, 647 (1990), the Court has long held that a facial challenge may succeed only after the claimants have met their burden of showing "no set of circumstances" in which the law may be constitutionally applied." *United States v. Salerno*, 481 U.S. 739, 745 (1988); *See Reno v. Flores*, 507 U.S 292, 301 (1993). A similar rule governs vagueness challenges. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982) (facial challenge must be rejected unless the law is "impermissibly vague in all of its applications"). In some circumstances, if not in most or all circumstances, the police clearly do not violate substantive due process when they order individuals reasonably suspected of criminal gang activity to disperse.

CONCLUSION

For the foregoing reasons, the *amici* States respectfully urge the Court to grant the writ and reverse the lower-court decision.

Respectfully submitted,

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